STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Michael J. Talbot, Peter D. O'Connell, and Donald S. Owens

On Appeal from the Michigan Tax Tribunal
Tribunal Judge Preeti P. Gadola

HARMONY MONTESSORI CENTER,
Petitioner/Appellant

v

CITY OF OAK PARK
Respondent/Appellee.
/

Supreme Court Docket No. 154819

Court of Appeals No. 326870

MTT Docket No. 370214;
New Number: 09-000003

JOSHUA M. WEASE (P61653)
CHRISTINA THOMPSON (P76436)
Alvin L. Storrs Low-Income Taxpayer Clinic
Attorneys for Petitioner/Appellant
P.O. Box 1570
East Lansing, MI 48826
(517) 432-6803
/

MEGAN K. CAVANAGH (P61978)
Garan Lucow Miller, P.C.
Attorney for Respondent/Appellee
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207-3192
(313) 446-5549

SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL

Appellant Harmony Montessori Center

ORAL ARGUMENT REQUESTED

Submitted By:

JOSHUA M. WEASE (P61653)
CHRISTINA THOMPSON (P76436)
Alvin L. Storrs Low-Income Taxpayer Clinic
Attorneys for Petitioner-Appellant
P.O. Box 1570
East Lansing, MI 48826
(517) 432-6803

Table of Contents

Table of Authority

Cases

Constitution

Statutes

STATEMENT OF QUESTION PRESENTED

In the June 21, 2017 order directing the Clerk to schedule oral argument on whether to grant the application or take other action on Petitioner's Application for Leave to Appeal, the Court ordered the parties to address:

Whether *Ladies Literary Club v Grand Rapids*, 409 Mich 748 (1980), and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231 (1968), continue to provide the appropriate test of what constitutes a "nonprofit…educational…institution []" under 211.7n.

Petitioner-Appellant Harmony Montessori Center would answer "No."
Respondent City of Oak Park would answer "Yes."
The Court of Appeals would answer "Yes."
The Tax Tribunal would answer "Yes."

Argument

Ladies Literary Club v Grand Rapids, 409 Mich 748 (1980) and _David Walcott Kendall Memorial School v Grand Rapids_, 11 Mich App 231 (1968), do not provide the appropriate test of what constitutes a "nonprofit...educational ...institution []" under MCL 211.7n because it does not establish a clear standard on how to identify the government's burden when analyzing a nonprofit educational institution that provides early childhood and elementary education.

A. Discussion

Harmony Montessori seeks to further advance the evolution of case law involving the nonprofit education tax exemption under MCL 211.7n. Cases of educational institutions seeking property tax exemption span as far back as 1889 with the case of *Detroit Home and Day School v City of Detroit*, 6 LRA 97 (October 18, 1889). However, the current line of case law that is instructive to the case at bar began in 1944 when this Court found that a nonprofit institution is entitled to an exemption from *ad valorem* property taxes if it can meet each of the four factors set forth in *Engineering Society of Detroit v Detroit*, 308 Mich 539, 550; 14 NW2d 79 (1944).[1]

In 1948, this Court decided *Detroit v Detroit Commercial College*, which established the test that an institution must "fit into the general scheme of education provided by the state and supported by public taxation." *Detroit v Detroit Commercial College*, 322 Mich 142, 153; 33 NW2d 737 (1948).

---

[1] This Court set forth the four-factor test to determine whether an institution could receive an exemption under this statute. The third factor under the *Engineering Society of Detroit* test has been found unconstitutional; therefore, the remaining three factors must be met. *See Chauncey & Marion Deering McCormick Foundation v. Wawatam Twp*, 186 Mich App 511, 516; 465 NW2d 14 (1990). Factors (1) and (4) are not in dispute based on the stipulations of the parties. (App. A, p 2a). This leaves only *Engineering Society of Detroit* factor (2) in dispute, which requires the "claimant must be a library, benevolent, charitable, education or scientific institution."

In 1968, the Court of Appeals decided *David Walcott Kendall Memorial School v Grand Rapids* to determine whether a specialized art college was entitled to the nonprofit education exemption. It formulated a test "to be applied in dealing with *schools of higher education*...." [emphasis added] *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231, 240; 160 NW2d 778 (1968). The *Walcott* court changed the path of the educational tax exemption with its "could/would" test. *See David Walcott*, at 240. The court formulated the test by posing the question "[i]f the particular institution in issue were not in existence, then would, and could, a substantial portion of the student body who now attend that school instead attend a State-supported college or university to continue their advanced education in that same major field of study?" *Id.* Posing this test as a question, the court opened up the educational tax exemption to an objective inquiry asking for an overall consideration of would a student body attend another state institution, if their institution did not exist.

In evaluating an educational institution's assumed government burden, courts have held that we should look to the institution applying for an exemption and the transferability of its *skills and classes* to state-supported institutions. *See David Walcott*, at 240. If an institution educates students in the same field, the institution seeking exemption "assumes a portion of the burden of educating the student which otherwise falls on tax-supported schools." *Id.*

Courts have applied *Walcott's* could/would test in evaluating a number of education and training programs to determine whether such programs are mandated by the Legislature's general scheme of education. *See Mich Laborers' Training & Apprenticeship Fund v Twp of Breitung*, unpublished opinion per curiam of the Court of Appeals, issued October, 23, 2002 (Docket No. 303723) (stating vocational training is not mandated by the state); *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661; 378 NW2d 737 (1985) (pointing out that conservation

education is not mandated); *Assoc of Little Friends v City of Escanaba*, 138 Mich App 302; 360 NW2d 602 (1984) (acknowledging daycare and vocational training is not mandated in 1984); *Circle Pines Ctr v Orangeville Twp*, 103 Mich App 593; 302 NW2d 917 (1981) (stating cooperative education does not relieve government burden); *Ladies Literary,* at 748 (1980) (stating educational and cultural programs did not fit within general scheme). However, this Court has not applied the *Walcott* "could/would" test to early childhood and preschool educational programs.

Last, in 1980, this Court was charged with the question of whether the Ladies Literary Club was entitled to the nonprofit educational exemption. *Ladies Literary Club v City of Grand Rapids*, 409 Mich 748; 298 NW2d 422 (1980). This Court acknowledged that the *Walcott* court had refined the earlier test of "fit in a general scheme of education" set out in *Detroit Commercial College*, supra, by adding a government burden test. It declared that "an educational exemption may be available to an institution otherwise within the exemption definition, if the institution makes a substantial contribution to the relief of the burden of government." *Ladies Literary*, at 755-756 citing *David Walcott*. This Court defined a two-factor test for institutions to qualify as an educational institution for property tax exemption purposes. *Ladies Literary*, at 751. First, the institution "must fit into the general scheme of education provided by the state and supported by public taxation." *Id.* citing *Detroit Commercial College*, supra. Second, an educational institution may qualify if it "makes a substantial contribution to the relief of the burden of government." *Id.* (citing *David Walcott*). Because the taxpayer in *Ladies Literary* did not involve an institution of higher education, let alone a specialized school, this Court did not apply the *Walcott* "could/would" test – and correctly so. This Court agreed with the Tax Tribunal's assessment that it was not an educational institution, but rather a cultural

and social one. *Ladies Literary*, at 756. It further held that if the club had not existed it would not proportionally increase the education burden on government. *Id.*

At this point of its evolution, the case law dictates that the analysis for exempting a nonprofit education institution – that is not a college – should include a determination of: (1) whether the taxpayer fits into the general scheme of education and (2) whether the institution makes a substantial contribution to the relief of the burden of government. With the could/would test under *David Walcott* having been specifically formulated for specialized schools of higher education, the parties and lower courts are left to decide just what is the government's burden and whether it is proportionally relieved.

One is left with the question of whether there are enough tools in the toolbox to appropriately analyze any type of nonprofit educational institution that might apply for an exemption under MCL 211.7n. Given the analyses and holdings from the Tax Tribunal and Court of Appeals in the instant case, Harmony Montessori would answer – no. An effective judicial test should provide enough clarity that taxpayers, assessors and the courts can effectively and consistently analyze a fact pattern without resorting to expensive and time-consuming litigation.

1. ***David Walcott's* could/would test is inappropriate because it was specifically formulated for higher education institutions which offer vastly different skills than the foundational and mandatory early childhood skills offered by institutions like Harmony Montessori.**

Each year, young students learn new lessons that build on the lessons they learned in their prior years of education. A student, who has not learned such basic skills as how to count, use language, or follow instructions, cannot successfully continue with his/her education. The state's burden in teaching such a student is dramatically increased because the state would *have* to teach

the child those skills before the student could move on to learn more advanced skills. The skills that students learn from early childhood through high school are fundamentally necessary to live in our society. These are the kinds of general education skills that Harmony Montessori provides to its students. Learning these skills is not optional for the student or the state.

a. The state has a constitutional and statutory duty to maintain and support public education at the early childhood and elementary school ages.

The Legislature is tasked with "maintain[ing] and support[ing] a system of free public education and secondary schools as defined by law." Const 1963, art 8, § 2. Under the Legislature's constitutional authority, it enacted the Revised School Code with the goal "to revise, consolidate, and clarify the laws relating to elementary and secondary education." 1976 PA 451; MCL 380.1 *et seq*. The Revised School Code identifies student qualifications for entering Michigan public schools. *See* MCL 380.1147. An individual at least five years old "shall have a right to attend school in the district." *Id.* Over the next thirty years, the ideal student remained the same; however, the Legislature amended the law to reflect changes in schooling supported by public taxation. In 2012, the Legislature allowed for individuals to enroll in kindergarten, if they reached age five by December 1 of a school year. *Id.*

This language remains today through the Legislature's most recent enactment. *See* MCL 380.1147(3). Eligibility for kindergarten in Michigan is open to individuals age four, if they reach age five by December 1. Moreover, even though each school district is not required to offer kindergarten, the Legislature provides funding to school districts on a per pupil basis for those districts that do. MCL 388.1606(4); MCL 388.1701(5). An elementary pupil is a student "in membership in grades K to 8" and "includes children enrolled in a preschool program." MCL

388.1604. Because the Legislature recognizes kindergarten and provides funding to these programs, kindergarten falls within the general scheme of education.

Preschool programs also fall within the general scheme of education as evidenced by the Legislature's definition expansion of "educational pupil." *See* MCL 388.1604. Preschool and school readiness programs allow individuals to enroll in state-sponsored schools prior to reaching the eligibility requirements of kindergarten. *See* MCL 388.1637. Part of the criteria in evaluating a district for funding involves determining whether "more than 50% of the children participating in the program live with families with a household income that is equal to or less than 250% of the federal poverty level." MCL 388.1637(g). Until this Act was repealed in 2009, the requirement remained the same, except the poverty level increased to 300%. *See* MCL 388.1637(g). By the Legislature's exact language stating, "more than 50%," this allows preschool programs to enroll any individual that reached age four as long as more than 50% of the individuals come from family with specific income requirements. Petitioner does not take the position that its programs qualify for a "preschool readiness program;" however, it does provide programs to students who can participate in these state-funded programs.

The general education skills that are taught by Harmony Montessori were uncontroverted at trial. Harmony's preschool program curriculum includes 31 skills in focus areas including practical life, sensorial, language (oral, reading development, and writing), math, and social development (behavior, group setting, and work habits). (App. A, p 6a). Harmony Montessori's kindergarten program curriculum consists of approximately 30 skills in five focus areas: language, math, handwriting, geography & science, and work habits. (App. A, p 6a-8a). The state has a burden of teaching these same skills and if Harmony Montessori did not exist and students arrived at a state school's doors, it would have to teach the students these skills.

b. The "could/would" test motivates a simple comparison of student ages as a basis for substantial relief of government's burden, which ignores the foundational and mandatory nature of early childhood and elementary school skills.

The "could/would" test has a flaw when it is applied to early childhood and elementary education programs. This is due to the drastic difference between the college coursework at issue in *Walcott*, and the foundational, mandatory early childhood skills in this case. The "could/would" test only looks at whether a student would use or burden state resources—in the absence of Harmony—*at the time* those students are taking classes. This logic of the "could/would" test makes sense when it is applied to college students, where the government burden is a finite four year college diploma. But it does not make sense when it is applied to foundational skills taught at early childhood and kindergarten classes that will impact their success, and ability to advance, in elementary school (lasting six years into the future). If Harmony did not exist and the student attends a public school, the state would have the burden of teaching the student, and the remedial education could take a number of years.

While *Walcott's* could/would test may be an appropriate test for specialized schools of higher education – for which it was explicitly formulated – this test is not necessary for early childhood and elementary education programs. The question of whether students acquire these foundational skills is not a matter of "if" but of "when," which is a critical distinction from the skills at issue in *Walcott*. The Tax Tribunal ignored uncontroverted evidence that the state's education burden is significantly relieved by a student's possession of these foundational skills because if Harmony Montessori did not exist and the student went to a state school without these skills, the state would HAVE to provide remedial education before the child could progress to more advanced skills.

2. This case exemplifies why this Court needs to clarify the government's burden under *Ladies Literary* as it applies to property tax exemptions claims involving nonprofit educational institutions providing early childhood and elementary skills training.

Based on the lower courts' inconsistent application of the two factor test to the instant case, Michigan jurisprudence needs the Supreme Court to set clear factors to be considered. In the instant case, the Tax Tribunal and Court of Appeals fashioned an inconsistent and patently incorrect way of analyzing Harmony Montessori's program by misapplying both the *Ladies Literary* and *David Walcott* could/would tests. This misapplication includes such errors as: (a) improperly analyzing the government's burden based on participation in the Great Start Readiness Program and (b) excluding a particular teaching method from eligibility for an exemption.

a. The lower courts incorrectly used participation in the Great Start Readiness Program as basis for finding relief of government burden.

The Tribunal's original decision granting Respondent's Motion for Summary Judgement was reversed by the Court of Appeals in Harmony. *See Harmony* (2014), unpublished opinion per curiam of the Court of Appeals, issued February 18, 2014 (Docket No. 312856). (App. B) The Court of Appeals found that Petitioner satisfied the first prong under *Ladies Literary* in that both preschool and kindergarten fell "within the government's general scheme of education." (App. B, p 2a-3a). However, the Court of Appeals stated the Tribunal "failed to consider the children who were enrolled in [P]etitioner's preschool program that would and could have attended the Great Start Readiness Program, and that would and could have attended a state-funded kindergarten program." *Id.*

The Great Start Readiness Program (GSRP) is a state-funded preschool program for four-year-old children who may be at risk of educational failure. The program is administered by the

Michigan Department of Education. State funding is allocated to each intermediate school district to administer the program locally. The GSRP's website states, "Research on preschool programs and specific research on GSRP indicates that children provided with a high-quality preschool experience show significant positive developmental differences when compared to children from the same backgrounds who did not attend a high-quality preschool program."[2] While the GSRP is evidence that these skills are so important that the state has a specially funded program for at risk youth, it should not be used as a threshold qualification for qualifying for the property tax exemption under MCL 211.7n for several reasons.

Using GSRP as a basis for a nonprofit educational institution exemption is problematic. First, determining whether a nonprofit educational institution relieves the government's burden based on the Great Start Readiness Program – a specific government funded program – would doom the courts to appeals if that program ever ended. Second, requiring participation in the program to prove relief of government burden would necessarily limit nonprofit educational institutions to only at-risk students, which is far more restrictive than the statute allows. Instead of using it as a threshold barrier to getting the exemption, it should be enough to demonstrate that the skills that GSRP are trying to ensure that four-year-olds have are comparable to the skills that the taxpayer is providing.

b. The Tribunal's denial of the exemption based on the Montessori teaching method was contrary to uncontroverted testimony at trial and would necessarily doom the courts to deal with endless appeals from other nonprofit educational institutions that utilize different teaching methods.

---

[2] Great Start Readiness Program <http://www.michigan.gov/mde/0,4615,7-140-63533_50451---,00.html> (accessed August 19, 2017) (App. F).

The Tribunal considered whether students "could and would" attend a state-funded kindergarten or state-funded "Great Start Readiness Program." (App. C, p 4a, 6a). The Tribunal found that although forty-seven five-year olds attended Harmony Montessori Center and two preschoolers could qualify for the "Great Start Readiness Program," each individual student would not attend its respective state-funded program based on two factors: the Montessori-teaching method and parents paid a portion of Harmony's tuition. (App. C, p 4a, 7a). The Tribunal's determination is clear error because there was no evidence presented by either side that a parent who was paying to send their child to a Montessori school would only send their child to another Montessori school.

The Tribunal's application of the "could/would" test is also incorrect because it is based on a critical assumption. The Tax Tribunal's conclusion that if Harmony did not exist, that parents simply just send the child to another Montessori program rather than a public school (App C., p 6a) *assumes* that there would always be multiple Montessori programs in every geographic area. This is a critical assumption that is not supported by the record.

In evaluating the Montessori Method, the Tribunal compared the differences between the Montessori teaching method and public education. (App. C, p 5a). Due to its specificity, such as "specially trained teachers, multi-age interaction, advanced subject matter beyond public school kindergarten, and with small student-teacher ratios," the Tribunal held that Petitioner's parents would send their children to another Montessori school. (App. C, p 5a). However, this conclusion is not supported by the record given that no parents testified at trial and actually ignores testimony to the contrary. Petitioner's witness, Karen King, testified that students attend the school from all over the region, such as "Oak Park, Ferndale, Huntington Woods, Southfield, Detroit, [and] Royal Oak. (App. D, p 13a). When asked specifically if Petitioner did not exist, would Petitioner's students

attend Oak Park [public school], Ms. King, affirmed that some would. (App. D, p 15a). None of this testimony was controverted at trial, yet the Tax Tribunal concluded that the children would not attend a public school if Harmony did not exist.

The Tax Tribunal's holding in this case is completely different from its analysis of a similar Montessori program in *Petoskey Montessori Children's House v Bear Creek Twp*, 1986 WL 20565 (1986) (App. E), in which the Tax Tribunal held:

> The fact that the parents of the Montessori School children are willing to pay the tuition costs and the fact that these parents are actively involved in the educational process itself (per testimony) indicate to us that they are concerned with their children's education. Therefore, if the Moutessori [sic] School did not exist, we are persuaded that a high percentage of these children would attend the comparable classes offered by their local school district. [*Petoskey Montessori*, at *3. (App. D, p 4a)]

Despite having two cases involving Montessori schools that offer general education, using the Montessori Method, the Tribunal formulated two completely different holdings. In 1986, it found that this was evidence that the children would go to public schools if the school did not exist, but the Tax Tribunal in this case found that the parents would only send their child to another Montessori school. This inconsistency of analysis, which will be addressed in the next section, further points to the need for clarification of the test for early childhood and elementary education programs.

The Tribunal then asked whether there were "any public Montessori schools funded by the state for which Harmony is relieving a burden?" (App. C, p 5a). Although the Tribunal only inquired about Montessori schools, the Tribunal's decision focused specifically on public Montessori schools. The Tribunal's decision creates a problem because several public schools – including Detroit Public Schools, Jackson Public Schools and Okemos Public Schools – have adopted the Montessori teaching approach since the Tribunal's decision in Harmony. In fact, the American Montessori Society recently reported on their website that over 400 public schools

nationwide have adopted the Montessori approach.[3] Given the growing number of public schools that have adopted the Montessori Method, the Tribunal's comparison to public education is already outdated, if not patently incorrect.

Basing a tax exemption on a school's teaching method will necessarily demand a new property tax appeal every time a school uses a different, new or innovative approach to teaching. The Montessori Method is one of many approaches to teaching children. For instance, if a school taught the same general education topics that Harmony Montessori does, but was devoted to teaching students using the "flipped classroom" teaching approach,[4] would they be entitled to an exemption under MCL 211.7n? Following the Tax Tribunal's unsupported analysis and conclusion, they would likely say that it is a specialized school and parents would only send their kids to flipped classroom schools.

3. **Even if the tests under *David Walcott* and *Ladies Literary* are appropriate, this area of law still needs clarification because the lower courts have improperly analyzed the government's burden to early childhood and elementary education institutions and inconsistently applied the test to similar taxpayers.**

The analysis and decisions of the lower courts do not correctly analyze the facts, apply the tests or correctly construe the statute at issue. Although tax exemptions must be strictly construed in favor of the taxing authority, this does not permit strained statutory construction that is adverse to the Legislature's intent. *Mich United Conservation Clubs v Lansing*, 423 Mich 661, 664-65; 378 NW2d 737 (1985). This includes interpreting statutes too narrowly. As Justice

[3] American Montessori Society <https://amshq.org/Montessori-Education/Introduction-to-Montessori/Montessori-Schools> (accessed, August 19, 2017).

[4] "Flipping the classroom" is a teaching technique started in Colorado by teachers, Jonathon Bergman and Aaron Sams. It is a teaching method in which students first learn the material outside of class, often through readings or online videos, and then class time is used to problem-solve, discuss or debate the material.

Williams stated in his affirming opinion in *Ladies Literary*, "...we must not construe the instant statute so narrowly as to do violence to the Legislature's intent." *Ladies Literary*, at 762. In the instant case, the tests and analysis applied by the lower courts are subjective and so narrowly construed that no educational institution would be able to receive an exemption.

In the instant case, the Tax Tribunal drastically changed its analysis. Contrary to the objective standard posed by *Walcott* and confirmed in *Petoskey*, the Tribunal answered the "would" factor with a subjective conclusion that was not supported by any evidence. (*See* App. C, p 5a). "[G]iven that the Montessori Method is a specific type of teaching, with specially trained teachers, multi-age interaction, advanced subject matter beyond public school kindergarten, and with small student-teach ratios, that if [Petitioner] didn't exist, the parents of [Petitioner] would send them to another Montessori school, but not to public school. (App. C, p 5a (emphasis in original)). This conclusion enters the minds of parents and uses the court's judgement to determine a student's attendance at another school. This subjective standard is contrary to *Petoskey Montessori*, which objectively stated "[t]he fact that the parents of the Montessori School children are willing to pay the tuition costs and the fact that these parents are actively involved in the educational process (per testimony) it indicates to use that they are concerned with their children's education." *Petoskey Montessori*, at *3 (App. E, p 4a). The Tribunal's new subjective interpretation would require dragging parents into court just to ask where their children would attend school, if Petitioner did not exist. This was not the purpose of the test posed by the *Walcott* court. "[T]heir decision appreciably reduces the great burden placed on large institutions." *David Walcott,* at 239. Meaning that the student's decision – not the court's decision – to pursue education at an institution is what matters for *Walcott*'s "would" factor. The court formulated the test to inquire whether the students would as a whole attend another school, if Petitioner were not in existence.

B. Conclusion

This Application for Leave to Appeal is ripe for consideration by this Honorable Court. The tests set out in *David Walcott* and *Ladies Literary* need clarification on how to identify and analyze the government's burden in early childhood and elementary education programs to avoid further misapplication by local assessors and lower courts.

Respectfully submitted,

Dated: August 23, 2017

By: _____

Joshua M. Wease (P61653)
Christina Thompson (P76436)
Alvin L. Storrs Low-Income Taxpayer Clinic
Attorneys for Petitioner-Appellant
P.O. Box 1570
East Lansing, MI 48826
(517) 432-6803